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DRAFT DELIBERATIVE. DO NOT RELEASE UNDER FOIA. NOTHING CONTAINED HEREIN SHALL BE CONSTRUED AS CREATING ANY RIGHTS OR BINDING EITHER PARTY

**MEMORANDUM OF AGREEMENT BETWEEN
THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
DRAFT MAY 19, 2020

I. GENERAL

A. Purpose

This Memorandum of Agreement (MOA or Agreement) is entered into by and between the Florida Department of Environmental Protection (FDEP) and Region IV of the United States Environmental Protection Agency (EPA) for the purpose of defining the federal and state roles in carrying out the policies, regulations, and procedures necessary to administer the State of Florida permit program established pursuant to Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code (U.S.C.), § 1251 *et seq.* (hereinafter “State 404 Permit Program”), and to facilitate program coordination between FDEP and EPA. FDEP does not exercise jurisdiction over Indian country, as that term is defined in 18 U.S.C. § 1151 and will not be seeking such authority through this Agreement. This Agreement does not create any substantive standards relating to any aspect of the 404 Permit Program or impose any legal obligations on the public, and does not alter applicable provisions of Section 404 of the CWA.

C.D. Authorities

(1) The implementing regulations concerning assumption of the 404 program under the CWA are found at 40 C.F.R. 230, 231, 232 and 233. The legal basis for the State’s assumption of the 404 program is provided by Section 404(g)(1) of the CWA.

(2) FDEP shall administer and enforce the State 404 Permit Program in accordance with those state laws and administrative rules that EPA has defined as components of the federally authorized State 404 Permit Program in the State of Florida (40 C.F.R. § 233.7X2), and in accordance with Section 404 State Program Regulations (40 C.F.R. Part 233), the CWA, Section 404(b)(1) Guidelines (40 C.F.R. Part 230, Section 404(b)(1) Guidelines for Specifications of Disposal Sites for Dredged or Fill Material) (hereinafter “404(b)(1) Guidelines”), the terms and conditions of incidental take coverages (if any) as may be provided in conjunction with EPA’s review of the State 404 Permit Program, and provisions contained in this Agreement and the Memorandum of Agreement between FDEP and the United States Army Corps of Engineers (Corps). The State 404 Permit Program will operate in accordance with any applicable biological opinion issued in accordance with the shall conform to the requirements for federally listed species.

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~~proposed species, designated critical habitat and proposed to be designated critical habitat
protections under the Endangered Species Act of 1973 (ESA).~~

D.C. Effective Date and Revisions

(1) This Agreement shall be executed by FDEP and EPA and shall take effect at the time of EPA approval of the State 404 Permit Program, which shall be the effective date published in the Federal Register.

(2) FDEP and EPA agree to maintain a high level of cooperation and coordination and to work in partnership to assure successful and effective administration of the State 404 Permit Program.

(3) Nothing in this Agreement shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under the CWA, nor shall it restrict FDEP's enforcement responsibilities under Florida law.

(4) This Agreement, and procedures established in conformance with it, shall be reviewed periodically by FDEP and EPA. Either party may request in writing an amendment or modification to the Agreement. Amendments and modifications to this Agreement shall be in writing and shall be effective upon completion of the process outlined in 40 C.F.R. § 233.16 and upon signature of both parties.

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(5) This Agreement, and any amendments and modifications thereto, shall remain in effect until the State 404 Permit Program authorization is modified in a manner that would affect this Agreement, EPA withdraws authorization pursuant to 40 C.F.R. § 233.53(b), or FDEP voluntarily transfers the program to the Corps according to the criteria and procedures established in 40 C.F.R. § 233.53(a).

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D. Confidentiality

(1) All of the information EPA transfers to FDEP will be provided subject to the procedures and limitations of 40 C.F.R. § 233.3 and applicable Florida law.

(2) Any information obtained or used in the administration of the State 404 Permit Program shall be available to EPA and EPA will manage this information in accordance with any rights and privileges under applicable laws and regulations. If information has been submitted to FDEP under a claim of confidentiality, FDEP must inform EPA of such a claim. All information submitted by FDEP subject to a claim of confidentiality shall be treated in accordance with the procedures of 40 C.F.R. Part 2, 40 C.F.R. § 233.3(c), and applicable law.

E. Computing Time Periods

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In computing any period of time prescribed by this Agreement, the day on which the designated period of time begins shall not be included. Saturdays, Sundays, and state and federal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

G.F. Florida DEP Agreement with Corps

(1) Prior to the assumption of the 404 Permit Program by FDEP, the Jacksonville District of the Corps administered the 404 Permit Program in Florida. The District Engineer of the Jacksonville District has been delegated the authority to enter into a Memorandum of Agreement which will identify procedures to facilitate for the transfer of the 404 Permit Program to FDEP as laid out in the regulations at 40 C.F.R. Part 233 and pursuant to CWA requirements.

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(2) FDEP's Memorandum of Agreement with the Corps stipulates permit processing responsibilities for activities which involve non-assumable waters, as well as transfer of permitting authority from the Corps to FDEP. The Memorandum of Agreement identifies the State waters to be regulated, coordination procedures, general permit procedures, transfer of records, protection of navigation or anchorage, permitting for Corps water resource projects, mitigation and instrument approval, and permitting for emergency work. The legal effect of the Memorandum of Agreement between FDEP and the Corps is conditioned upon approval of the State 404 Permit Program.

H.G. Florida Memorandum of Understanding with the United States Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission

(1) Based on the submittal of a biological assessment as part of FDEP's Section 404 Assumption application package and a request for a formal consultation by EPA to the U.S. Fish and Wildlife Service (USFWS), it is anticipated in the event that a programmatic biological opinion and incidental take statement is will be issued by the USFWS, a process will be established whereby FDEP will engage in technical assistance with the USFWS for State 404 Permits, in response (State 404 BiOp). The USFWS State 404 BiOp will provide the guidance and direction to FDEP for engaging in technical assistance with the USFWS on a project by project, State 404 Permit Program permit application review basis. The roles and responsibilities of each agency will be established in the Memorandum of Understanding between the FDEP, FWC, and the USFWS.

(2) Given the existing relationship between FDEP and the Florida Fish and Wildlife Conservation Commission (FWC) regarding the protection of fish and wildlife resources for the FDEP Environmental Resource Permitting Program, and the existing relationship between FWC and the USFWS established in the ESA Section 6 Coordination Agreement, the FWC may engage with the USFWS on behalf of FDEP for the species coordination reviews in the State 404 Permit Program. The roles and responsibility for each agency will be established in the Memorandum of Understanding between FDEP, FWC, and the USFWS.

H. Florida Memorandum of Understanding with Other Agencies

The FDEP may enter into agreements with other agencies. To the extent any of these agreements, understandings, or parts of these agreements/understandings conflict with the requirements of CWA, implementing regulations, or other assumption related statutes or implementing regulations, the agreement or that part of the agreement will not become part of the assumed program. Any revisions to the State 404 Permit Program must comply with the procedures laid out in 40 C.F.R. § 233.16.

II. PERMIT APPLICATION REVIEW AND PERMIT ISSUANCE

A. Lead Agency Responsibility for State 404 Permit Program

(1) FDEP will be the lead agency in Florida for administering the State 404 Permit Program for assumed waters, which are identified in (rule citation), assumed consistent with the Memorandum of Agreement between FDEP and the Corps. FDEP shall administer the State 404 Permit Program as approved by EPA using this Agreement, applicable state and federal laws, and any separate working agreement which shall be entered into and approved by with EPA as part of the state program, as necessary for full administration of the State 404 Permit Program. EPA shall review the State 404 Permit Program established by FDEP in order to ensure consistency with the program reporting requirements of 40 C.F.R. § 233.52. The FDEP shall also allow EPA routinely to review State records, reports, and files relevant to the administration and enforcement of the approved program consistent with 40 C.F.R. § 233.13(b). This does not preclude EPA from initiating independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

(2) The FDEP is responsible for making final permit decisions pursuant to Rule 62-331, F.A.C., including final determinations of compliance with FDEP State 404 permit regulations including and protective measures recommended by the USFWS during project technical assistance, in the anticipated State 404 BiOp as well as recommended protective measures during project specific technical assistance (Section 404(h) of the CWA, once assumption is approved). FDEP acts as the project manager for the evaluation of all permit applications and is responsible for requesting and evaluating information concerning all permit applications. The FDEP will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The FDEP will not evaluate applications as a project opponent or advocate – but instead will maintain an objective evaluation, fully considering all relevant factors. FDEP will fully consider and address the EPA's views, permit conditions, and objections when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit. Pursuant to its authority under Section 404(b)(1) of the CWA and its important role in the State 404 Permit Program, the EPA may provide comments identifying its views regarding compliance with the Section 404(b)(1) Guidelines and as authorized under

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Section 404(c) of the CWA. The comments will be submitted within the time frames established in this agreement and applicable statutes and regulations.

(3) FDEP may delegate the State 404 Permit Program to other State governmental regulatory agencies in Florida but will maintain oversight and will retain the ability to revise or rescind permits issued by the delegated entities. If FDEP proposes to delegate all or part of the State 404 Permit Program, such delegation is not effective until the EPA Regional Administrator approves the delegation pursuant to 40 C.F.R. § 233.16.

B. Waiver of EPA Review

(1) Pursuant to Section 404(k) of the CWA and 40 C.F.R. § 233.51, EPA waives the requirements of Section 404(j) and the regulations adopted thereunder regarding federal review of FDEP permit applications for all but the following categories of permits:

- a. Draft general permits;
- b. Discharges with reasonable potential for affecting endangered or threatened species as determined by USFWS;
- c. Discharges with reasonable potential for adverse impacts on waters of another state or tribe;
- d. Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the CWA) or hazardous substances in reportable quantities (Section 311 of the CWA);
- e. Discharges located in proximity of a public water supply intake;
- f. Discharges within critical areas established under state or federal law, including but not limited to national and state parks; fish and wildlife sanctuaries or refuges; national and historical monuments; wilderness areas and preserves; sites identified or proposed under the National Historic Preservation Act; and components of the National Wild and Scenic Rivers System;
- g. Discharges impacting compensatory mitigation sites, including mitigation banks, in lieu fee program sites, and permittee responsible mitigation sites; and
- h. Discharges impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity.

(2) EPA may terminate waiver of the review of categories of permit applications outlined in this Agreement pursuant to 40 C.F.R. § 233.51(a).

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(3) The FDEP shall supply the EPA Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA, pursuant to 40 C.F.R. § 233.50(a)(1).

(4) FDEP or the applicant may request EPA review of specific projects that would otherwise not require EPA oversight.

(5) When FDEP receives a new permit application for continued work on a long term project for which a permit with a long term planning document attached for reference had been previously issued, pursuant to section 62-331.051(2), F.A.C., FDEP will identify fundamentally new factual information included in the new permit application that was not in the prior permit application. In such instances, EPA intends to focus its review on shall be limited to matters related to such new factual information. The information contained in the long-term planning document is for reference purposes only and shall not be considered information in the prior permit application for purposes of limiting EPA's review of the new permit application.

Commented [GSA7]: What about when an applicant has to file a new application because its original permit expired but the work was unable to be completed. Is there any reason EPA can't limit its review of the subsequent application to new factual information?

C. Coordination with Other States and Tribes

(1) Whenever FDEP receives an application for a permit that has a reasonable potential to impact the waters of the states of Alabama or Georgia, or waters within "Indian country," as that term is defined at 18 U.S.C. § 1151, FDEP shall transmit a copy of the public notice to the potentially impacted state or federally recognized tribe (per the list published annually by the Secretary of the Interior pursuant to § 104 of the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. No. 103-454, 108 Stat. 4791, 4792)) and to EPA. EPA intends to shall assist FDEP in the identification of regulatory contacts in these other states and tribes.

a. The potentially impacted state or tribe shall provide comments and suggest permit conditions to FDEP within the public comment period, or within 30 days of the date of the public notice, whichever is longer, regarding the potential impact of the proposed project.

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b. FDEP shall consider the comments and concerns of the potentially impacted state or tribe when making a decision on the application and shall provide a copy of the final permit decision to a state or tribe that provides comments. If FDEP does not accept these recommendations, FDEP shall notify the affected state or tribe and the EPA Regional Administrator prior to permit issuance in writing of FDEP's decision not to accept the recommendations together with supporting rationale. The EPA Regional Administrator shall then have the time provided for in 40 C.F.R. § 233.50(d) to comment upon, object to, or make recommendations with respect to a permit application.

c. Pursuant to 40 C.F.R. § 233.50, EPA may object to the issuance of a State 404 permit by FDEP if it finds that the proposed project would fail to comply with the 404(b)(1) Guidelines due to the impact on waters of another state or waters within "Indian country," as that

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term is defined at 18 U.S.C. § 1151. In this instance, FDEP shall proceed as specified in Section 404(j) of the CWA and Section D of this Agreement.

(2) Both EPA and FDEP agree that this Agreement does not waive any legal claims, rights, or positions that the United States or the State of Florida have over what constitutes "Indian country," as statutorily defined at 18 U.S.C. 1151.

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D. Permit Processing and Federal Comment

(1) FDEP shall promptly submit public notices, via weblink, providing EPA access to complete permit applications in the categories identified in Section II.B.(1) of this Agreement for review and coordination in accordance with Section 404(j) of the CWA and 40 C.F.R. Part 233, Subpart F.

(2) Material submitted to EPA, which may be forwarded by electronic means, shall include:

a. A copy of the public notice for any complete permit application received by FDEP, except those for which permit review has been waived under this Agreement. Any supplemental or additional materials submitted to FDEP, including but not limited to information on project alternatives, environmental assessment, or mitigation plans, shall also be forwarded promptly to EPA. Whenever requested by EPA, FDEP shall supply copies of public notices for permit applications, or supplemental materials, even for projects for which permit review has been waived.

b. A copy of each draft general permit whenever the FDEP intends to issue a general permit that affects State assumed waters, including minor project categories defined under State law.

c. For permit applications that are subject to federal review, and for draft general permits, notification of when FDEP takes a significant action pursuant to 40 C.F.R. § 233.50(a)(3).

d. A copy of every permit issued and a copy of any denial of a permit.

e. A copy of FDEP's response to comments or recommendations made by another state or tribe if FDEP does not accept such recommendations.

(3) EPA shall, ~~not later than~~ within 30 calendar days from the date of receipt of a permit application or draft general permit from FDEP, notify FDEP if EPA does not intend to review the permit application or draft general permit. EPA reserves the right to object within 90 days based upon information received during the public comment period (see end of 233.50(d)) for language

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(4) EPA shall coordinate review with the Corps, USFWS, and National Marine Fisheries Service (NMFS), and submit comments to FDEP in accordance with the requirements of, and in the timeframes specified in, Section 404(j) of the CWA and its implementing regulations. However, EPA ~~intends to~~ shall make every attempt to provide comments or objections within the timeframe specified in Florida law, to the extent that the timeframe does not conflict with federal law. FDEP shall notify EPA of FDEP's decision deadlines for each application or draft general permit.

(5) FDEP shall respond to any such comments or objections received from EPA in the manner specified in Section 404(j) of the CWA and 40 C.F.R. Part 233. FDEP shall provide a copy of a draft permit that satisfies the EPA Regional Administrator's objection or requirement for a permit condition, or FDEP shall provide its intent to deny the permit application to EPA as provided by Section 404(j) of the CWA and 40 C.F.R. Part 233.

(6) If FDEP does not resolve an objection or requirement for a permit condition, and FDEP does not deny a State Environmental Resource Permit (ERP), then the State ERP shall not provide authorization under Section 404 of the CWA, and the applicant shall be notified of this fact in writing.

(7) FDEP shall contact EPA, the Corps, USFWS, and NMFS to solicit comments pertaining to issuance of an emergency permit as soon as possible after the emergency permit is requested, but no later than the day of issuance of the emergency permit. FDEP shall send a copy of the written emergency permit to the EPA.

(8) The FDEP may administratively continue expiring Corps-issued or State-issued permits until the effective date of a new permit, if any, consistent with 40 C.F.R. § 233.38, or a decision is made not to issue a new permit.

E. Coordination Concerning Discharges with Reasonable Potential for Affecting Endangered or Threatened Species

(1) ~~BACKGROUND: At the request of FDEP, EPA designated FDEP as the non-Federal representative to prepare a programmatic biological assessment to evaluate the potential effects of EPA's proposed approval of the State of Florida's assumption and administration of the State 404 Permit Program on ESA-listed species, proposed species, designated critical habitat, and proposed critical habitat. EPA stated that it would voluntarily engage in consultation with the Services under ESA Section 7 in their letter dated December 12, 2019 to FDEP. In a letter dated April 15, 2020 to FDEP, the National Marine Fisheries Service concluded that federally-listed species under their jurisdiction do not occur in waters that are assumable by the State. Based on that assessment, they assumed that EPA would make a "no effect" determination for species under their jurisdiction that were originally identified as part of the proposed assumption in the biological assessment. EPA's request for formal consultation with USFWS will result in the USFWS issuing a programmatic biological opinion in response (State 404 BiOp). This biological opinion is~~

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anticipated to provide for a species coordination review process similar to that outlined in FDEP's Biological Assessment (BA, dated xx/xx/xxx), and will include any additional procedures and processes needed for adequately addressing future State 404 permits. It is anticipated that, based on the information provided in the BA, the USFWS will be able to conclude that jeopardy or adverse modifications or destruction of critical habitat are not likely to occur as a result of the State 404 Permit Program. This anticipated conclusion would result in the inclusion of an Incidental Take Statement (ITS) in the State 404 BiOp that will exempt all incidental take associated with the future State 404 permits from being considered prohibited take under Section 9 of the ESA. This Section 9 exemption provided is contingent on the EPA, FDEP and the State 404 permittee complying with the processes and conditions described in the BA, state rules, and any reasonable and prudent measures, as well as terms and conditions provided in the USFWS State 404 BiOp, and future recommendations during the technical assistance process. In the event of a biological opinion from the USFWS, the biological opinion will provide for a species coordination review process. Any additional procedures and processes needed for adequately addressing impacts to listed species or designated critical habitat in future state 404 permits.

(2) In the event that a USFWS program assumption BiOp is issued, it would provide the process for FDEP's technical assistance with the USFWS on a project by project state 404 permit application review basis. REVIEW: The USFWS State 404 BiOp provides the guidance and direction to FDEP for engaging in technical assistance with the USFWS on a project by project, State 404 Permit Program permit application review basis. As per the MOU mentioned above between FDEP, FWC and USFWS, the FWC may engage with the USFWS on behalf of FDEP for the species coordination review. All applications for an individual permit, and all applications for permit proposals subject to EPA review (in accordance with section 5.2.5 of the 404 Handbook and 40 C.F.R. §233.51(b)), will require a public notice to be sent to the EPA and USFWS. Those projects subject to federal review are those with reasonable potential for affecting endangered or threatened species. Under the State 404 Permit Program, projects with reasonable potential for affecting listed species are the same as projects that have been determined by FDEP and FWC, in coordination with USFWS, to affect or impact listed species. The word "impact", as defined in Rule 62.331, FAC, is used to describe adverse effects under State rules as well as potential "may affect" and "adverse effects" under ESA. In order to assist EPA in deciding which applications they may review that may have a reasonable potential for affecting endangered or threatened species, FDEP will include the type of impact determination in the public notice as follows:

a. If a project is anticipated to jeopardize the continued existence of a species, or adversely modify or destroy critical habitat, the public notice will include such a statement.

— If a public notice states that a project is *likely to adversely impact* a federally listed or proposed to be listed species or designated or proposed to be designated critical habitat, those projects are reasonably certain to cause harm to individual(s) or critical habitat as a result of

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~~proposed activities. If the adverse impacts can be sufficiently avoided and minimized, the conclusion of the review will state *No Jeopardy/No Adverse Modification*.~~

~~b. If a public notice states that a project is *not likely to adversely impact* a federally listed or proposed to be listed species or designated or proposed to be designated critical habitat, those projects are reasonably certain to impact or affect individual(s) or critical habitat as a result of proposed activities.~~

The public notice will also include the proposed protection measures to avoid and minimize adverse impacts that will be implemented through conditions to the proposed State 404 permit. Additional information will be provided to EPA at their request during the public notice period and comment period, as needed. Provided information shall be sufficient for EPA to decide whether the project has a reasonable potential for affecting endangered or threatened species pursuant to 40 CFR § 233.51(b)(2).

(3) AGREEMENTS: Consistent with the 404(b)(1) Guidelines regulations, Rule 62-331, F.A.C., the CWA and the ESA, FDEP and EPA agree to the following regarding the reasonable potential to affect endangered and threatened species, as part of the state of Florida's assumption of administration of a CWA Section 404 program of the CWA to the State of Florida:

~~a. The EPA and FDEP shall work in good faith to implement and administer the terms and conditions of incidental take coverages (if any) as may be provided in conjunction with EPA's review of the State 404 Permit Program.~~

~~b. EPA and FDEP shall work in good faith to implement the terms and conditions of incidental coverages (if any) as permit conditions in the State 404 permit.~~

~~c. The FDEP shall not issue a State 404 permit to authorize discharge of dredged or fill material if the discharge is anticipated to jeopardize the continued existence of endangered or threatened species or results in the likelihood of destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). It is acknowledged that a State 404 permit may be issued if reasonable and prudent alternatives are available from USFWS as a result of technical assistance.~~

b. The FDEP will provide EPA, through the public notice process, all permit applications subject to EPA review (in accordance with section 5.2.5 of the 404 Handbook and 40 C.F.R. § 233.51(f)(4)), and all additional pertinent information needed to perform their review. In addition, FDEP may contact EPA to identify permit applications that FDEP believes the EPA would like to be aware of or have an interest in providing comments.

c. At their request, the FDEP will provide EPA any permit application and additional pertinent information needed to perform a review, regardless of whether it is within a category waived for Federal review per 40 CFR § 233.51(a).

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d. The EPA may notify the FDEP within 30 days of receipt of the public notice that there will be no comment, but that they reserve the right to object within 90 days of receipt based on any new information brought out by the public during the comment period or at a hearing.

e. EPA may review the public notice for the complete permit application pursuant to 40 CFR 233.50. If needed, EPA will share the public notice and other information needed for the review with the Corps and USFWS for federal review (and they will provide any comments to EPA pursuant to the procedures in 40 CFR § 233.50(b)). In deciding whether to exercise its objection authority, EPA will consider any information and recommendations submitted by the FDEP and give appropriate deference to the State's views given the substantial expertise of Florida agencies and implementation of protection measures resulting from technical assistance with the USFWS, related to protection of federal endangered and threatened species.

f. EPA will notify FDEP within 30 days of receipt of its intent to comment, object, or require permit conditions with respect to a permit application, draft general permit, or the FDEP's failure to accept the recommendations of an affected State (submitted pursuant to § 233.31(a)) pursuant to 40 CFR 233.50(d), after receipt of any comments from the Corps and USFWS.

g. If FDEP has been notified as stated above, the permit will not be issued until after the receipt of such comments or 90 days of the EPA's receipt of the public notice, draft general permit or FDEP's response (§ 233.31(f)), whichever comes first.

h. FDEP will not issue a permit if the EPA objects to a permit or communicates a requirement for a permit condition. Pursuant to 40 CFR § 233.50:

1. If EPA withdraws the objection or the requirement for a permit condition, they shall notify FDEP and FDEP may then issue the permit.

2. If FDEP revises the permit to satisfy the objection or requirement for a permit condition, they will notify EPA and may then issue the permit.

3. FDEP shall notify EPA if it cannot satisfy EPA's requirement for a permit condition or if it cannot deny the permit, and EPA shall notify FDEP if its objections are not satisfied. The EPA may notify the Corps, who shall process the permit application. ~~If the Corps processes the permit application, the Corps will be responsible for fulfilling any applicable requirements under section 7(a)(2) of the Endangered Species Act.~~

Commented [MH10]: Q for EPA – would you prefer this whole section in the MOA, or just a reference to the State 404 Program rule?

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H.F. Coordination of Mitigation Banking

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(1) FDEP and EPA agree that mitigation banking projects shall be subject to review by an Interagency Review Team (IRT). Mitigation banking instruments and in-lieu fee program instruments shall be processed by the Corps in accordance with 33 C.F.R. Part 332. For those whose service areas either wholly or partially include State assumed waters, FDEP shall may be a co-chair of the Interagency Review Team.

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(2) EPA may seek to participate on the IRT at EPA's discretion.

III. COMPLIANCE MONITORING AND ENFORCEMENT

A. EPA will continue to directly implement its authority for the 404 Permit Program in "Indian country," as that term is defined at 18 U.S.C. § 1151, including conducting necessary compliance monitoring and enforcement actions for activities and sites located on Indian country.

B. EPA will retain responsibility for any pending enforcement actions undertaken by EPA prior to the date of EPA's approval of the State 404 Permit Program. FDEP shall have primary responsibility for compliance monitoring and enforcement of the State 404 Permit Program. FDEP will take timely and appropriate enforcement action against persons in violation of permit conditions of permits issued pursuant to the State 404 Permit Program and against persons conducting unauthorized discharges of dredged or fill material into waters of the United States over which FDEP has assumed jurisdiction under the State 404 Permit Program.

C. FDEP shall notify EPA of the status of compliance and enforcement actions through submission of an annual report described in Section IV.B. of this Agreement.

D. EPA may request the opportunity to review any compliance and enforcement record. FDEP shall provide to EPA a copy of the file when requested.

E. FDEP shall coordinate with EPA when a violation is identified that is within the permit and discharge categories in Section II.B.(1) of this Agreement. FDEP shall provide a summary of the unauthorized activity and inform EPA of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application. In the event that an after-the-fact permit application is accepted, FDEP shall follow the permit review procedures set forth in this Agreement, the CWA and its implementing regulations.

F. FDEP may refer information regarding possible or alleged violations to EPA and may request that EPA consider initiating a parallel or independent enforcement action. Such circumstances include, but are not limited to:

- (1) Violations that have or have a reasonable potential to have direct impacts on waters of a tribe or another state;
- (2) Major or repeat offenses; and

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- (3) Violations that have, or will potentially have, major adverse resource impacts or impacts on special federal resources, such as federally listed threatened or endangered species.

G. EPA may initiate independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

H. If FDEP proposes to resolve a compliance or enforcement issue through a consent agreement (administrative or judicial), and where the impact of the violation is such that federal review would not be waived as described in Section II.B.(1) of this Agreement, FDEP shall provide EPA 30 days to review and comment on the draft consent agreement prior to signature. If EPA objects to a provision of the draft consent agreement, the executed consent agreement implementing that provision shall not constitute authorization under Section 404 of the CWA. FDEP shall provide a copy of the executed consent agreement and any after-the-fact State 404 permits to EPA.

I. FDEP shall provide for public participation in the State 404 Permit Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2).

J. Prior to proceeding with federal enforcement action against a possible or alleged State 404 Permit Program permit violator or unauthorized discharge, and for purposes of providing notice only, EPA ~~intends to~~ shall inform FDEP (specifically to the Secretary of FDEP or his/her designee) that federal enforcement action is to be initiated. ~~This notification shall be made to the Secretary of FDEP or his/her designee. It is expected that preliminary staff discussions will take place between EPA and FDEP representatives before initiation of federal enforcement action.~~

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K. When a violation is identified that may affect the waters of tribes and/or other states, FDEP shall provide a summary of the violation and inform the tribes and/or other states of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application.

IV. PROGRAM MAINTENANCE

A. Program Review and Oversight

EPA may, in accordance with Section 404(i) of the CWA, conduct periodic evaluations of the State 404 Permit Program.

B. Reporting

(1) FDEP shall submit to EPA an annual report evaluating Florida's administration of the State 404 Permit Program, identifying problems encountered in administration of its program, and recommendations for resolving these problems. The report shall include:

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a. An assessment of the cumulative impact of the State 404 Permit Program on the integrity of state regulated waters.

b. A summary of the number and nature of individual and general permits issued, modified, or denied during the year, and permits not yet processed.

c. A summary of the number and nature of violations or suspected violations identified and the nature of enforcement actions taken.

d. An estimate of the extent of total impact to state regulated waters from individual and general permits.

e. A summary of any significant changes in program operations or procedures.

f. Other information of particular concern or interest.

(2) Within 60 days of receipt of the draft annual report, EPA will complete review of the report and transmit comments, questions, or requests for additional information to FDEP.

(3) FDEP may modify the report to address the comments of EPA. The final report shall be made available to the public.

Commented [MH14]: Consider adding timeframes from regs.

(4) The period for the annual report shall be the State fiscal year ending June 30th, and the report shall be submitted to EPA by September 30th of each year.

C. State 404 Permit Program Modifications

(1) FDEP shall promptly notify EPA of any proposed or actual change to FDEP's statutory or regulatory authority or any other modifications which are significant to administration of the State 404 Permit Program, including, but not limited to:

a. An action by the State Legislature to strike down or limit State authorities, or that contemplates cessation of the administration of the Section 404 Permit Program by the State of Florida.

b. An action by a State court striking down or limiting State authorities.

c. Revision of the State's legal authorities needed to maintain consistency with changes to applicable federal regulations.

d. Proposed transfer of the program in whole or in part to another State agency.

(2) In response to notification of a change in the State 404 Permit Program in accordance with paragraph (1), EPA shall inform FDEP in writing of specific concerns regarding

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State authority and shall provide the State an opportunity to make any necessary program revisions in accordance with 40 C.F.R. § 233.16(d).

a. If the proposed revisions are not substantial, notice of approval may be given by letter to the Governor or designee, per 40 C.F.R. § 233.16(d)(2).

b. If EPA determines that the proposed revisions are substantial, EPA shall publish notice of the proposed revisions, provide opportunity for a public hearing, consult with the Corps, USFWS, and NMFS, and review the proposed modification in accordance with 40 C.F.R. § 233.16(d)(3). Such changes shall not be effective until review and approval by EPA and publication of notice in the Federal Register.

(3) Whenever EPA has reason to believe that circumstances have changed with respect to the State 404 Permit Program, EPA may request, and FDEP shall provide, a supplemental Attorney General's statement, program description, or other documents or information necessary to evaluate the State 404 Permit Program's compliance with the requirements of the CWA and regulations at 40 C.F.R. Part 233.

(4) If FDEP determines that it will no longer administer the State 404 Permit Program, FDEP shall provide notice to EPA and the Corps not less than 180 days prior to cessation of program operation, and shall arrange for transfer of all program materials to the Corps.

(5) Pursuant to 40 CFR section 233.16(b), FDEP shall revise the State 404 Permit Program as necessary because of a modification to 40 CFR Part 233 or any other applicable Federal statute or regulation. The program shall be revised within one year of the date of promulgation of such regulation, except if the State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(6) Any program modifications that necessitate modifications to this Agreement shall not be effective until the modified agreement is signed by FDEP and EPA, and EPA gives notice of approval of program modifications.

V. ELEVATION OF POLICY ISSUES

~~A. National or regional issues relating to resources, policy, procedures, and regulation interpretation, can be elevated by either agency to their respective leadership for resolution if so desired. Individual permit decisions will not be delayed during the policy issue elevation process.~~

~~B. If either agency considers the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination, the FDEP Secretary, or EPA Regional Administrator (or designees) may initiate policy implementation review between the State of Florida and EPA through written notification. The written notification will describe the issue in sufficient detail and provide recommendations~~

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~~for resolving the issue. Depending on the level of the issue, the Secretary or Regional Administrator (or their designees) will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.~~

~~C. At no time should individual permit decisions be delayed pending resolution of policy issues pursuant to this MOA. Similarly, changes in policy (i.e., new policies) that occur as a result of this procedure should not affect applicants who have submitted a complete permit application prior to implementation of such policy change.~~

~~D. Upon resolving a particular policy or procedure, the FDEP will determine if the policy is of sufficient importance to warrant public comment. All decisions will be implemented pursuant to the requirements of State statutes and rules, including public notice and comment rulemaking as necessary.~~

~~VI. ELEVATION OF INDIVIDUAL PERMIT DECISIONS~~

~~A. Elevation of issues related to specific individual permit cases will be limited to those cases that involve aquatic resources of national or state importance. For example, cases that do not meet this resource value threshold cannot be elevated under this MOA over a dispute concerning practicable alternatives. More specifically, elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by FDEP) will result in unacceptable adverse effects to aquatic resources of national or state importance. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest with the FDEP Secretary.~~

~~B. Under Section 404(c), EPA may initiate a public process to prohibit or restrict the specification by the FDEP of a site for the discharge of dredged or fill material, and this authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. An EPA Regional Administrator initiates a 404(c) action if he or she determines that the impact of a proposed permit activity is likely to result in 1) significant degradation of municipal water supplies (including surface or ground water), or 2) significant loss of or damage to fishery areas and shellfish beds, wildlife, or recreation areas.~~

~~VII. V. GENERAL PROVISIONS~~

~~A. The Parties are entering into this Agreement based solely on the representations and warranties herein and not based on any promises, representations, and/or warranties not found herein.~~

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- B. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any persons, their officers or employees, or any other person. This MOA does not apply to any person outside of FDEP and EPA.
- C. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or enforceability of the CWA, the ESA, Florida laws, or implementing regulations.
- D. Nothing in this MOA shall be interpreted as obligating the signatory agencies for the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.
- E. Nothing in this agreement authorizes any take of federally listed threatened or endangered species.
- F. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.
- G. If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision shall be deemed to be severed and deleted; and neither such provision, nor its severance and deletion, shall affect the validity of the remaining provisions.

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VIII.YI.....SIGNATURES

Florida Department of Environmental Protection

Date: _____

By: _____

United States Environmental Protection Agency Region IV

Date: _____

By: _____

DRAFT